FCC 13-122

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies	)	WT Docket No. 13-238
	)	
Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting	)	WC Docket No. 11-59
	)	
Amendment of Parts 1 and 17 of the Commission's Rules Regarding Public Notice Procedures for Processing Antenna Structure Registration Applications for Certain Temporary Towers	)	RM-11688 (terminated)
	)	
2012 Biennial Review of Telecommunications Regulations	)	WT Docket No. 13-32

COMMENTS OF MISSOURI MUNICIPAL LEAGUE

The Missouri Municipal League would like to take this opportunity to provide its comments to the FCC's Notice of Proposed Rulemaking, *FCC 13-122,* Adopted and Released by the FCC on September 26, 2013 (the "NPRM" and "Proposed Rule" contained therein), and published in the Federal Register on December 5, 2013. See 78 FR 73144.

The Missouri Municipal League (the "League") was organized in 1934 as an agency for the cooperation of Missouri cities, towns and villages to promote the interest, welfare and closer relations among them in order to improve municipal government and administration in the state of Missouri. The League consists of more than 650 Missouri cities and villages, representing approximately ninety-five percent (95%) of the incorporated population in Missouri.

The MML and its members strongly oppose the Proposed Rule as outside the scope

of the legislation, a threat to public safety, against reasonable expectations of property owners and residents, and adverse to the public interest. These Comments will not attempt to address each area for comment raised by NPRM, but shall provide the comments of the League on discrete areas having some of the greatest impact on the League's member municipalities and its constituent members of the public.

A. "Substantially Change the Physical Dimensions"

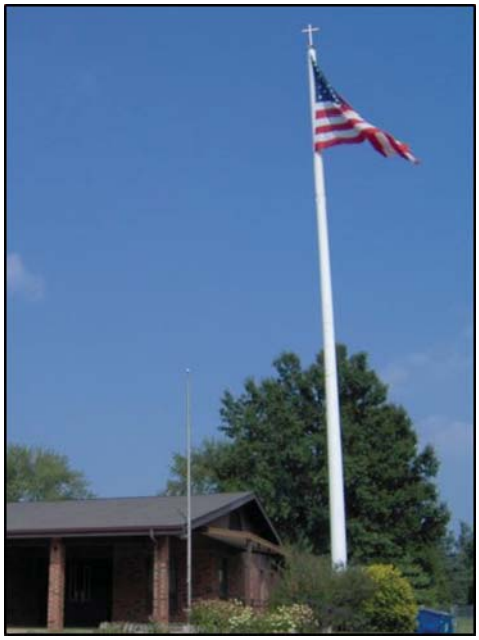
The League will first address the NPRM's request for comments contained at ¶¶116-122[1] on the proposal to define by rule the term "Substantially Change the Physical Dimensions" as that term is used in 47 U.S.C. § 1455.

1. Application of Act Should be based on Local Circumstances, not Predetermined by FCC

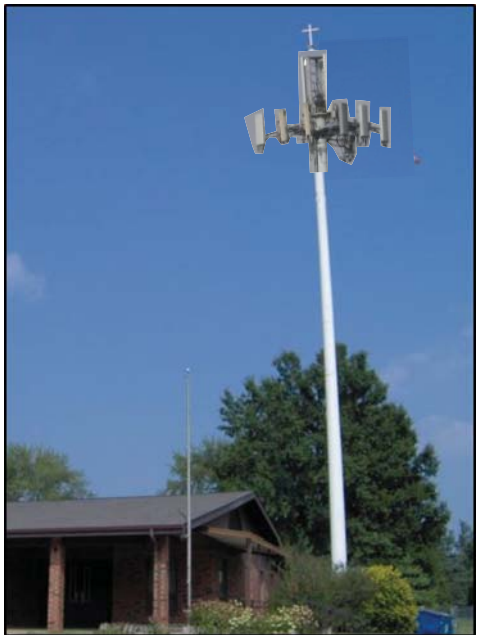
First, the League strongly opposes the FCC's proposed attempt to define "Substantially Changes the Physical Dimensions" at a national level irrespective of local laws and circumstances, thereby depriving the public of the protections of existing local and State lawful requirements and adjudicative processes. In this regard, the League agrees with the views of the Intergovernmental Advisory Committee set forth at ¶ 122. The "substantiality" of change in the physical dimensions of a tower or base station can only be reasonably determined on a case-by-case basis and, minimally, with consideration of local laws and existing community standards. This is because the size and appearance of many wireless support structures are the result of careful balancing, taking into consideration the needs of wireless providers, the surrounding environment, and the desires of community residents and constituents regarding the appearance of their community. For example, the picture at Exhibit A-1 depicts a typical wireless communications facility in the suburban St. Louis community of Overland, Missouri.

[1]All references to paragraph numbers are to paragraphs contained in the NPRM, unless otherwise indicated.

This facility is located at a small private school and is completely surrounded by property zoned for single family residential use. This facility was built under a conditional use permit and area variance which allowed the structure to blend into the school site and area as a whole. As a result, multiple wireless providers are able to provide wireless service with a disguised flagpole tower to a residential community without resorting to exposed platforms or other industrial-type facilities. Rote application of rigid mathematical standards to determine whether a modification to that facility "substantially change[s] the physical dimensions," would destroy not only its disguised appearance, but independently disregard the careful community zoning and safety decisions made for the appropriateness of each type of structure. The Proposed Rule would also wholly nullify numerous lawful and local regulations as to the authorized design, size, location and appearance of the structures, thereby impacting the character of the surrounding residential community and causing untold potential unintended consequences. Application of the "one-size fits all" rule proposed by the NPRM would preempt local zoning and allow the disguised structure shown in **Exhibit A-1** to have exposed and unlawful extensions, and new violations of setbacks from horizontal



Ex. A-1 – Disguised Flagpole Tower

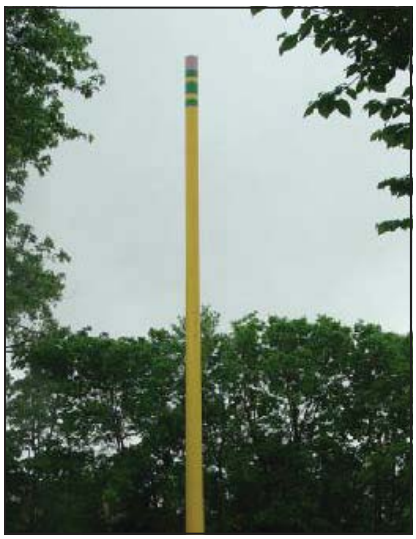


Ex. A-2 – Potential Modified Tower Under Proposed Rule

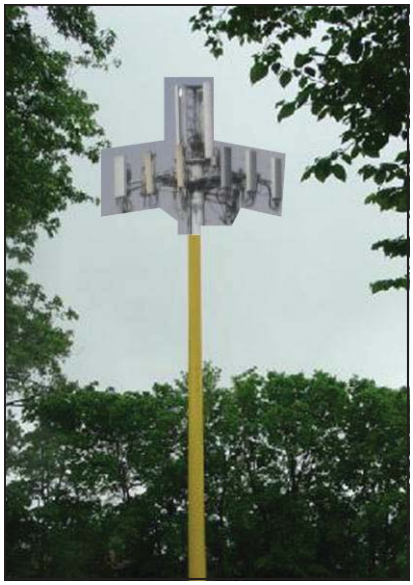
extensions as reflected in **Exhibit A-2**. Imagining this nationwide provides just a glimpse of the extreme impact and harm that will be caused by the Proposed Rule. In short, this is not a subject that is amenable to a single rule that disregards local law, circumstances and site-specific considerations that have been properly considered in specific local decisions and codes.

2. NPRM's Standards for Attachments are Unreasonable and Inequitable

Second, if the FCC sought a one-size-fits-all definition of "Substantially Change the Physical Dimensions," it certainly should not utilize the standards set forth in ¶ 118 of NPRM. Of particular concern is the third standard listed in ¶ 118, which proposes to define when modifications that add *horizontal* width to a wireless facility constitute a "substantial change" in the physical dimensions of a facility. Particularly, use of a uniform twenty -foot-or-less (< 20") standard for antenna attachments to all existing towers would lead to inevitable absurd results. For example, in the City of Liberty, Missouri, City officials worked with AT&T Mobility to accommodate approval of a one hundred-foot (100') monopole even though proximate to the City's historic downtown district. See **Exhibit B-1.** The monopole was constructed with all antennas contained within the cylinder of the monopole and was painted to resemble a traditional No. 2 pencil to honor the community's educational institutions.[2] The addition of appurtenances to support antennas that extend out twenty feet (20') from the tower, as



Ex. B-1 - Pencil Tower



Ex. B-2 - Potential Modified Pencil Tower

[2]This tower was the subject of a previous filing to the FCC by League-member City of Liberty, Missouri. See Reply Comments of Liberty, Mo., WT 11-59.

of right, would create a monstrosity that is nearly half as wide as it is tall (40':100') and would completely destroy the "cell tower as public art" concept that the wireless service provider and the City were able to work out, negatively impacting the nearby historic district that the City was originally seeking to protect. See **Exhibit B-2.**

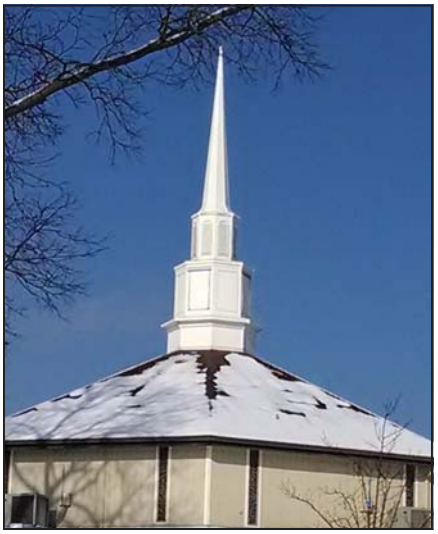
Any Rule that attempts to preempt local law and existing structure approvals to allow disguised structures to become exposed towers with horizontal contraptions, crows nests, and exposed industrial equipment is clearly beyond the intent of the Statute, and would cause preposterous results altering the community, property values, and reasonable expectations of all, including the telecommunication industry. Surely, no owner of a disguised flagpole understood their local building and zoning approval to allow them to wholly disregard the required "disguise" for which the tower was approved.

Yet, the Rule is unworkable also for non-disguised towers for similar reasons. A tower approved adjacent to structures, public ways, or other site improvements may have had existing height, location, and dimension requirements to protect neighboring properties, improvements and safety. By imposing a one-size-fits-all preemption, towers with a 4-foot extension (so limited because of proximity to sidewalk or parking lot) would be irrationally allowed an additional 16-foot extension creating potential ice-fall, debris field, and other concerns that the original approval addressed. Additions to towers under 47 U.S.C. § 1455 should not be allowed as of right to extend beyond current approved extensions of such towers. If a structure currently has a zero-profile as found in **Exhibits A and B**, (i.e., all antennas are contained within the canister of the monopole with a 20 inches diameter, for example) then all collocations should likewise be required to have a zero-profile on the 20-inch diameter monopole, unless subjected to the existing process to protect the public.

In addition to addressing some of the concerns regarding stealth structures noted below, this standard would be more equitable to existing providers. The League recognizes that there is an increase in cost that often accompanies the design and construction of stealth and other low-visual impact wireless facilities. The existing providers who worked in good faith with local governments and undertook the additional cost to construct low-impact facilities would be placed at a disadvantage to late-coming collocators, who under the Proposed Rule would be able to ignore the higher cost/low-impact design and construction of the existing structure and collocate on a structure in the cheapest means possible within the minimal standards established under the Proposed Rule. If collocators under 47 U.S.C. § 1455 are required to comply with the same design and construction standards that were undertaken by the original wireless provider on the structure, all providers within that market would be placed on an equal competitive footing. In short, any change to the horizontal or vertical dimensions should not be preempted from local review under existing law.

3. Stealth Structures Should be Wholly Excluded from any NPRM Standards

Next, the League addresses the NPRM's request for comment at ¶ 121 (also ¶ 127), regarding whether a test to determine if a modification constitutes a substantial change should apply to "stealth structures." As discussed above, *any modification* that defeats or is inconsistent with the local requirements for stealth characteristics of a structure constitutes a substantial modification that is not covered by 47 U.S.C. § 1455. Stealth structures are often employed to protect the areas most sensitive to the negative visual impacts of wireless structures; residential neighborhoods, historic districts, commercial corridors designed to attract new development, commercial/residential mixed use districts, etc. **Exhibit C** depicts yet another classic stealth strategy, the church steeple. Modifications that protrude from this



Ex. C - Disguised Steeple Facility

structure by twenty feet or increase the height the steeple by ten percent (without completely reconstructing the steeple to continue the steeple design to the new height, which would appear to not be required under the NPRM's proposed standards), would look absurd and transform the community aesthetic now advanced by the steeple into a negative impact. The construction of stealth structures are also often the result of careful negotiations between wireless providers and local governments, balancing coverage needs with the need to protect against unnecessary negative visual impacts. Modifications that turn a stealth structure into a obvious wireless facility that is visible to the general public undermines this balancing and defeats the goals that allowed the stealth structure to be constructed in the first place. The standard proposed in the NPRM would, in effect, retrospectively change the rules and turn every stealth structure that was approved on the condition that the stealth structure constitutes the minimum visual impact necessary to address coverage needs into a potential site for unfettered expansion of wireless facilities. This would be highly inequitable to the residents and businesses that depend on local governments to protect them in ensuring that reasonable land use expectations are not thwarted to ensure the long-term viability of their community to support planned growth and prosperity.

B. NPRM Would have Consequences Unintended by Congress of Non-Proliferation of New Structures and Increased Litigation

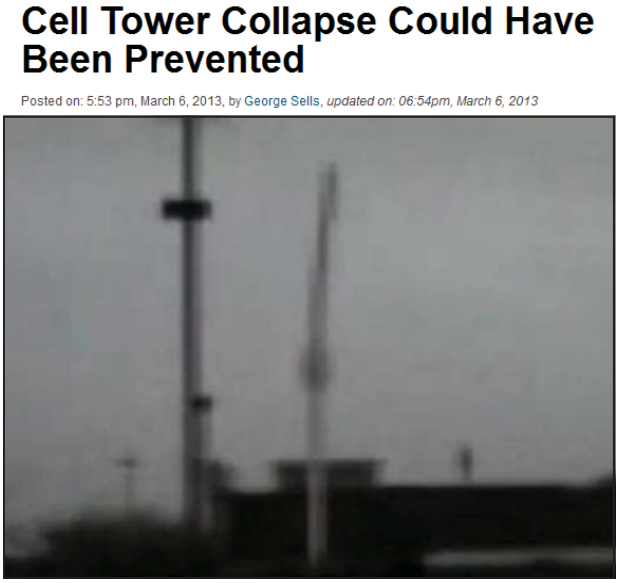
Furthermore, and what should also be of particular concern to the FCC and telecommunications industry, is that the standards contained in the NPRM would have

significant consequences limiting future approvals, which is the exact opposite intent of 47 U.S.C. § 1455. If put in place, the Proposed Rule would drastically reduce the rate of construction of ***new*** wireless facility support structures because local governments would now not be able to enforce the requirements of any approval, as the Proposed Rule would instantly nullify those approval limitations and allow for massive alteration of disguised structures, as well as defeat specific height and horizontal limitations on all approved towers by imposing unfettered and unregulated modifications and collocations on the community. In other words, why would a city authorize a new monopole as a disguised flagpole in a residential neighborhood like that found in **Exhibit A**, or as public art as found in **Exhibit B**, if once it is built, its disguise can be wholly destroyed in disregard of local law and community expectation? Similarly, a city must decline to approve a tower in a tight location that is safe as a monopole but not with horizontal extensions, because the Proposed Rule would nullify the safety and aesthetic limitations to the approval. Thus, the available locations for new towers would be reduced to only those where the future modifications made as of right by the Proposed Rule would be safe and acceptable.

The Proposed Rule would have the effect of substantially discouraging expansion of the wireless infrastructure system beyond its current configuration, making collocation the only ready means of expanding the national wireless network, thus leaving areas that need new tower construction potentially underserved, further exacerbating the so-called “digital divide” by favoring currently-served areas over underserved areas. The goals of the Statute are furthered by implementation that promotes local creativity and flexibility, not discourage it by unworkable impositions that disregard site-specific approvals.

C. The Meaning of "May Not Deny and Shall Approve"

The League will next address the NPRM's request for comments contained at ¶¶124-129 on the proposal to define by rule the term "May Not Deny and Shall Approve" as that term is used in 47 U.S.C. § 1455. Nothing in this language suggests the preemption of local law and reasonable requirements that ordinarily are conditions of such approvals. The Proposed Rule fails to expressly include language authorizing conditions as required by law to make such application conform to applicable safety, zoning and other lawful regulations.



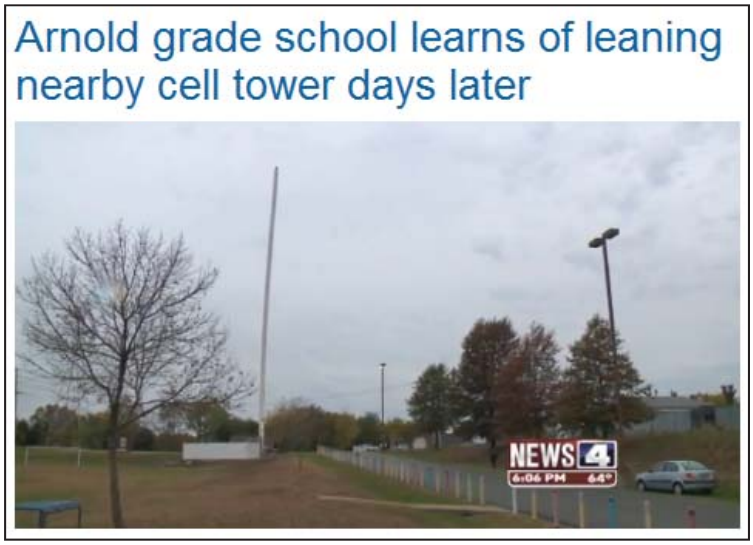
Ex. D. - Video Screenshot of St. Louis Swaying Tower that Eventually Collapsed. See Video Here.

1. Local Building Codes

The League strongly opposes any definition of "May Not Deny and Shall Approve" that would not allow such approval to be conditioned on compliance with all applicable, lawfully-enacted regulations, including adherence to building codes, electric codes, and other safety codes. Such building codes provide a minimum floor for construction of any structures, and allowing modification of facilities in a manner that falls below such minimum standards would make an untenable policy decision to advance the availability of cheap wireless service above all other considerations, including the life and safety of nearby residents, businesses owners, employees and patrons. The members of the League are particularly sensitive to these safety considerations given the recent history of falling and dangerous wireless structures in our State. For example, in March 2013, a cell tower in St. Louis collapsed and damaged a nearby building and landed in a grocery store parking lot. See **Exhibit D**.[3]

[3]See local news report and video of Ex. D at: http://fox2now.com/2013/03/06/cell-tower-collapse-could-have-been-prevented/.

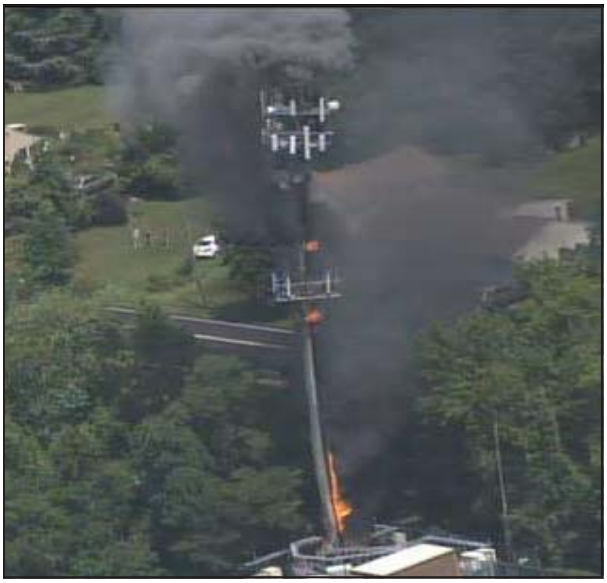
Later that year in November, a *second* leaning tower, this time in Jefferson County, Missouri, forced the closure of a nearby elementary school after it failed a stability inspection. **See Exhibit E.** Fortunately, no one was injured in either incident. However these recent events serve as stark reminders that wireless facilities still require government inspections and cannot be assumed to be safe structures. Therefore modifications under 47 U.S.C. § 1455 must still be subject to local inspections and code compliance to ensure that wireless facilities meet the minimum construction and safety standards (including wind and load-bearing requirements that may be unique to wireless facilities) imposed by local jurisdictions that are necessary to protect life and property. This problem is of course not unique to Missouri. Here is a sample of headlines across the nation in just the last three years showing the need for local building and safety code oversight of wireless facilities:



Ex. E - See local news report Here.
See also "Leaning cell tower of Jefferson County fails inspection, closing school," StlToday.com, October 30, 2013

- "Cell Tower Collapse Complicates Ordinance Review in Alaska," www.aglmediagroup.com, October, 25 2013, http://www.aglmediagroup.com/cell-tower-collapse-complicates-ordinance-review-in-alaska/
- "Afternoon Update: Cell tower, 2 homes collapse in Ballard County," www.kfvs.com, April, 4 2011, http://www.kfvs12.com/story/14380276/afternoon-update-cell-tower-2-homescollapse-in-ballard-county
- "High winds likely cause in cell tower collapse in Clinton Township, police say," www.lehighvalleylive.com, February, 18 2011, http://www.lehighvalleylive.com/hunterdon-county/expresstimes/index.ssf/2011/02/high_winds_likely_cause_in_cel.html

- "Bensalem Cell Tower Coming Down After Fire, Evacuations," www.myfoxhouston.com, June, 21 2013 http://www.myfoxhouston.com/story/22654749/bucks-county-cell-phone-tower-ablaze-in-danger-of-collapse (**See Exhibit F**)



Ex. F - Wireless Facility on Fire in Bensalem, Pa.

2. Even Industry Recognizes that Many Towers are not Currently Capable of Safely Accommodating New Antennas

Similarly, local jurisdictions must also be able to impose and enforce requirements that modifications be supported by engineering reports and/or inspections, and retain the ability to deny applications where these reports or inspections are unsatisfactory. This is particularly true in the current development environment in which wireless providers are often placing larger 4G/LTE equipment on mounting equipment that was designed only to support lighter 2G and 3G equipment. See *Antenna Mounts can be LTE's Achilles Heel*, AGL Magazine ("'With the introduction of LTE and smartphones, many remote radio heads have been installed on towers using the same mounts that the 3G antennas used, which are insufficient because they are rated for much lighter and smaller antennas.'")[4] Even members of the wireless industry recognize that, like the initial build-out of the national wireless network, wireless providers are looking to rapidly deploy 4G technology, and safety can sometimes become a secondary concern. See *Ibid*. ("In the hypercompetitive market of the late 1990s and early 2000s, new, **inexperienced vendors entered the market and helped to rapidly build out the infrastructure, but sometimes quality suffered….**"). The building and safety codes of local governments are one of the few mechanisms that stand in the way of a

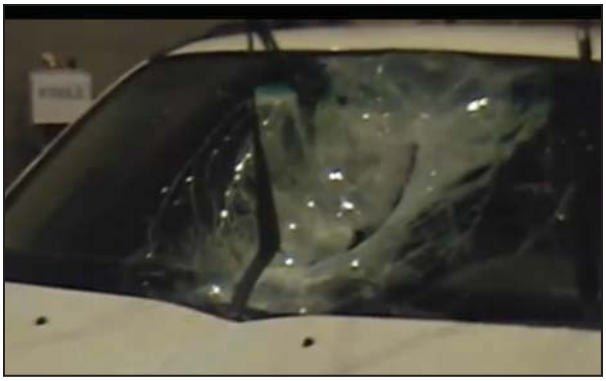
[4]See article at: http://www.aglmediagroup.com/antenna-mounts-can-be-ltes-achilles-heel-chapman/

similar too-rapid deployment of 4G technology that does not meet reasonable safety-protecting design and engineering standards.

Ex. G - Accumulated Ice on Wireless Facility

3. Fall Zone or Setback Requirements

Also addressing the NPRM's request for comments at ¶ 125, modifications under 47 U.S.C. § 1455 should be subject to local law related to health and safety, regardless of whether they appear in local building codes or land use regulations, particularly, setback or fall-zone requirements. Federal Circuit Courts throughout the Country have recognized that setback requirements are important safety regulations. *See U.S. Cellular Corp. v. Bd. of Adjustment of City of Seminole*, 180 Fed. Appx. 791, 799-800 (10th Cir. 2006) (City's denial of a variance to setbacks for a wireless tower supported by substantial evidence in that setbacks were related to safety concerns related to falling ice, debris, and tower failure. Setbacks "establish safe zones for falling tower debris or collapse" and are "intended to provide a safety area in case [of] tower failure, or, more likely to occur, the area in which ice will fall from the tower"); *see also USCOC of Greater Iowa, Inc. v. Zoning Bd. of Adj. of Des Moines*, 465 F.3d 817, 823 (8th Cir. 2006). (Upholding City's denial of CUP for wireless facility because application did not conform to City minimum lot-size and setback requirements and noting that "common sense dictates" that "ice will on occasion fall onto the property below."). **See Exhibit G.** A dramatic



Ex. H - Damage from Falling Ice. **See Video Here.**

example of the damage that can be done by falling ice can be found here. **See also Exhibit H.** Once again, the League does not believe it was the Congressional intent of 47 U.S.C. § 1455 that proliferation of collocation of wireless antennas should be advanced at the sake of reasonable safety requirements.

3. Non-Conforming or Unlawful Wireless Facilities

The League believes that 47 U.S.C § 1455 should not apply to legal, non-conforming wireless facilities (i.e., facilities that complied with local zoning regulations at the time they were approved, but are no longer in compliance due to changes in the regulations) or modifications that would make a wireless facility non-conforming, in that such modifications would be modifications that "substantially change" the existing wireless facilities, based on a reasonable interpretation that any change of a wireless facility that affirmatively violates governing zoning regulations is "substantial." Many League-members allow modifications to legal, non-conforming wireless facilities after administrative review which allows modifications that seek to bring the non-conforming facilities into conformance "to the maximum extent possible." Often this allows Cities to address any problems with a site, such as allowing a collocation on a non-conforming tower conditioned upon repair or installation of fencing/ landscaping to address risks of unauthorized access to facilities due to inadequate or non-existence barriers that were not required at the time the facility was first approved. Furthermore, modifications to non-conforming facilities are often allowed without conditions after review based on a determination that the modification advances the overall goals of the zoning ordinance. A common example of this is where a collocation to a non-conforming facility would allow a gap in coverage to be filled without the need for construction of a new tower, thus advancing the goal of utilizing existing infrastructure to the fullest extent possible

and limiting proliferation of new towers. However, not every modification or collocation advances these goals, and can only determined on a case-by-case basis.

What should not be allowed are modifications that further exacerbate the non-conforming condition of an existing facility. Forcing local governments to approve increases to the height or width of a facility that already violates setback and fall zone requirements unnecessarily elevates the desires of wireless providers over the safety and property values of residents and business owners. If existing facilities are not capable of accommodating the needs of a wireless provider without extending the non-conforming conditions of a facility, such a provider always has the option of seeking installation of new wireless facilities that conform to current requirements, which option is already significantly protected by the requirements of 47 U.S.C. § 332(c)(7)(B).

D. Applications

The League will last address NPRM's request for comments at ¶¶ 130-133, regarding applications. Cities should be able to require full applications, primarily because submission of full applications up front will provide for speedier processing of all applications and, on the whole, decrease costs for all parties. If an application is submitted only with information necessary to determine if it is covered under 47 U.S.C. § 1455 and the City determines that the application is not covered by that section, the applicant will need to prepare and file a new full application so that it may then be processed under the appropriate local procedure. This would impose additional time on the overall time for application review and wholly eliminates the ability to confirm safety and other code compliance. If a full application is submitted up front, then Cities can at the first instance determine if it is covered by 47 U.S.C. § 1455, and if not, immediately forward the application to the correct avenue for review without waiting for the

applicant to prepare and submit a new full application. Addressing applications on a piecemeal basis makes no sense where speed of approval is an important consideration for wireless providers and adds to City costs where staff and consultants are called on to review multiple application for a single project. Requiring applicants to fulfill all application requirements up front is a reasonable approach that benefits both cities and applicants in the long run.

Respectfully Submitted,

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